Public Prosecutor v Romi bin Ali & Anor

HIGH COURT (TAWAU) — CRIMINAL TRIAL NOS TWU-45–6/6 AND 7/6 OF 2013
CHEW SOO HO J
28 JANUARY 2014

Criminal Procedure — Charge — Accused persons jointly charged — Police laid out ambush and arrested accused persons — Drugs found in car where first and second accused were driver and passenger — First and second accused charged for trafficking 1155.96g dangerous drugs — First accused charged for having in possession, dangerous drugs — Whether prosecution successfully proved prima facie case — Dangerous Drugs Act 1952 ss 12(2) & 39B(1)(a)

Upon receiving information that a certain drugs transaction would take place, police officers PW2 and PW5 proceeded to a river bank with an ambush party. A green Proton Iswara entered the ambush position and parked by the side of the car which PW2 and PW5 came in. The first accused was seated at the front passenger seat while the second accused was the driver. The second accused alighted from the car and went towards the river bank where he was arrested by PW5 while PW2 arrested the first accused who was about to alight from the front passenger seat and was allegedly attempting to flee. A search of the said Proton Iswara and revealed a black Quiksilver bag on the floor at the front passenger seat. Upon further examination of this bag, it was found to contain two plastic packets of Alicafe Power Root 5 in 1 ('Alicafe'). In the first Alicafe plastic packet, 11 translucent plastic packets containing crystalline substance suspected to be methamphetamine were found. Inside the second plastic packet of Alicafe, two silver plastic packets also containing crystalline substance suspected to be methamphetamine were also found. These packets were heat-sealed and PW2 had to tear off part of the packets in order to examine the contents within them. The black bag was also found to contain clothings which were later found to body fit the first accused. PW2 subsequently conducted body search on the first accused and found two small translucent plastic packets containing crystalline substance suspected to be methamphetamine in the right front pocket of the jeans worn by the first accused. From the search on the second accused, PW2 did not recover anything incriminating. The suspected drugs together with the translucent plastic packets and the silver plastic packets which contained them were found to weigh 1,572.73g. Both the accused were charged with the following charges: against first and second accused for the offence of trafficking 1155.96g dangerous drugs, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') and against the first accused for having in possession, dangerous drugs, in contravention with s 12(2) of the DDA.

Held:

(1) There was no evidence from where the accused persons were alleged to have transported the said drugs to the crime scene. Evidence only showed that the second accused was driving the said Proton Iswara with the first accused seated at the front passenger seat. Although there was evidence from the owner of the said car that the second accused had come to his house with another person to take the said car as there was someone who was interested to buy the said car and wanted to see it but the other person who came along with the second accused was not identified whether he was the first accused or some other person by the owner of the car (see para 19).

(2) There was also no evidence that the second accused and/or the other companion was/were seen to have placed the black bag containing the drugs inside the car particularly at the floor of the front passenger seat after the second accused was handed the ignition key of the car. Hence, there was absolutely no valid reason to draw any inference that the drugs were 'transported' from the house of the car owner to the crime scene. This basic element of transporting from one point to another was clearly not proved at the end of the prosecution's case. In addition, there is not an iota of evidence to show 'any transaction that the accused proposed to 'enter into' as stated in *Mohamad Yazri bin Minhat*'s case. To echo the words of His Lordship Gopal Sri Ram as cited above 'the fact that the accused is transporting a quantity of drugs from one point to another does not make him a trafficker'. The same position should apply in the instant case. The prosecution failed to prove direct trafficking by 'transporting' under s 2 of the DDA to constitute the offence of trafficking under s 39B(1)(a) of the DDA (see paras 19–20).

(3) The court found doubt in the evidence of PW2 which was unsubstantiated that the first accused had attempted to escape particularly so when there was no evidence of any such conduct to attempt to flee. No reasonable inference could therefore be drawn from any conduct of the first accused that he had knowledge of the incriminating exhibits that was found in the black bag inside the said car. Upon a finding of fact, the court was not satisfied that such alleged conduct of an attempt to flee was proved by the prosecution to enable the court to draw a reasonable inference that with an attempt to flee, one could be said to perhaps have a guilty mind or knowledge of something incriminating that he was in possession of (see para 21).

(4) There was absolutely no evidence that the second accused was in whatever way linked to the black Quiksilver bag and the drugs in the Alicafe packets or any knowledge thereof apart from the mere fact that he was the driver of the green Proton Iswara. On the totality of evidence and upon a finding of fact, the prosecution had failed to prove a prima facie

case against the second accused of custody or control of the said drugs for the presumption under s 37(d) of the DDA to be invoked against the second accused (see paras 25–26).

(5) Apart from the fact that both accused were seen travelling in the same car to the scene and the mere allegation by PW2 and PW5 that the respective accused tried to flee without any evidence in support such as whether there was any struggle in arresting them as they attempted to run away or there was a chase before any of the accused could be apprehended or any act or conduct of the accused to show that there was indeed such an attempt, the mere fact of paying lips service saying that the accused tried to run away without more was profoundly insufficient to constitute proof of the alleged fact. There was no evidence to prove or to enable the court to draw a reasonable inference that there existed any pre-arranged or preconcerted plan to prove common intention under s 34 of the Penal Code against both the accused (see para 36).

[Bahasa Malaysia summary

Selepas menerima maklumat bahawa satu transaksi dadah akan dijalankan, pegawai-pegawai polis PW2 dan PW5 telah ke satu tebing sungai bersama-sama dengan pasukan serang hendap. Sebuah Proton Iswara hijau telah memasuki kawasan serang hendap dan meletakkan kereta bersebelahan di mana PW2 dan PW5 masuk. Tertuduh pertama duduk di tempat duduk penumpang bahagian hadapan manakala tertuduh kedua adalah pemandunya. Tertuduh kedua keluar daripada kereta tersebut dan telah ke tebing sungai di mana dia ditangkap oleh PW5 manakala PW2 menangkap tertuduh kedua yang hendak keluar dari tempat duduk bahagian hadapan dan didakwa cuba melarikan diri. Carian di dalam Proton Iswara tersebut menemui sebuah beg Quiksilver di atas lantai tempat duduk penumpang bahagian hadapan. Selepas memeriksa beg ini dengan lebih lanjut, didapati bahawa ia mengandungi dua bungkusan plastik Alicafe Power Root 5 dalam 1 ('Alicafe'). Dalam bungkusan plastik Alicafe yang pertama, 11 bungkusan plastik lutsinar mengandungi serbuk kristal disyaki methamphetamine ditemui. Dalam bungkusan plastik Alicafe yang kedua, dua bungkusan plastik perak yang juga mengandungi serbuk kristal yang disyaki methamphetamine turut ditemui. Bungkusan-bungkusan ini telah dilekat secara haba dan PW2 terpaksa mengoyakkan sebahagian bungkusan-bungkusan tersebut untuk memeriksa kandungan di dalamnya. Beg hitam yang mengandungi pakaian yang kemudiannya disahkan muat badan tertuduh pertama turut dijumpai. PW2 seterusnya melakukan carian badan ke atas tertuduh pertama dan menjumpai dua bungkusan plastik jernih mengandungi serbuk kristal yang disyaki methamphetamine dalam poket kanan seluar jean yang dipakai oleh tertuduh pertama. Daripada carian ke atas tertuduh kedua, PW2 tidak menjumpai apa-apa barang salah. Dadah yang disyaki bersama-sama dengan bungkusan plastik lutsinar dan bungkusan plastik perak yang mengandunginya

kemudiannya didapati seberat 1,572.73g. Kedua-dua tertuduh didakwa dengan pertuduhan-pertuduhan berikut: terhadap tertuduh pertama dan kedua bagi kesalahan mengedar 1155. 96g dadah berbahaya, satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') dan terhadap tertuduh pertama kerana mempunyai milikan dadah berbahaya, yang mana bercanggah dengan s 12(2) ADB.

Diputuskan:

(1) Tiada keterangan dari mana tertuduh-tertuduh dikatakan mengangkut dadah tersebut ke tempat kejadian. Keterangan hanya menunjukkan bahawa tertuduh kedua telah memandu Proton Wira tersebut bersama tertuduh pertama duduk di bahagian hadapan. Walaupun terdapat keterangan daripada pemilik kereta tersebut bahawa tertuduh kedua telah ke rumahnya dengan seorang lagi untuk mengambil kereta tersebut kerana ada orang yang berminat untuk membeli kereta tersebut dan ingin melihatnya, namun seorang lagi yang hadir bersama tertuduh kedua tidak dikenalpasti oleh pemilik kereta tersebut sebagai tertuduh pertama atau orang lain (lihat perenggan 19).

(2) Tidak juga terdapat keterangan bahawa tertuduh kedua dan/atau rakannya dilihat meletakkan beg hitam yang mengandungi dadah dalam kereta tersebut khususnya di atas lantai tempat duduk bahagian hadapan selepas tertuduh kedua diberikan kunci kereta tersebut. Oleh itu, tiada alasan sah sama sekali untuk menyimpulkan bahawa dadah-dadah tersebut diangkut daripada rumah pemilik kereta ke tempat kejadian. Elemen asas mengangkut dari satu ke tempat ke satu lagi tempat yang lain jelas tidak dibuktikan di akhir kes pendakwaan. Tambahan lagi, tiada sedikitpun keterangan pun untuk menunjukkan apa-apa transaksi bahawa tertuduh mencadangkan untuk 'masuki' seperti yang dinyatakan dalam kes *Mohamad Yazri bin Minhat*. Mengulangi perkataan YA Gopal Sri Ram seperti yang dinyatakan di atas 'the fact that the accused is transporting a quantity of drugs from one point to another does not make him a trafficker'. Kedudukan yang sama seharusnya terpakai dalam kes ini. Pihak pendakwaan gagal membuktikan pengedaran langsung dengan 'mengangkut' di bawah s 2 ADB untuk membuktikan kesalahan pengedaran di bawah s 39B(1)(a) ADB (lihat perenggan 19–20).

(3) Mahkamah mendapati bahawa terdapat keraguan dalam keterangan PW2 yang tidak berasas tentang tertuduh pertama cuba melarikan diri khasnya kerana tiada apa-apa keterangan mengenai tindakan sedemikian. Oleh itu, tiada inferens munasabah yang dapat dibuat mengenai apa-apa kelakuan tertuduh pertama bahawa dia mempunyai pengetahuan mengenai bahan-bahan yang dijumpai dalam beg hitam di dalam kereta tersebut. Atas dapatan fakta, mahkamah tidak berpuas hati bahawa dakwaan cubaan melarikan diri telah dibuktikan oleh pihak

pendakwaan untuk membolehkan mahkamah membuat kesimpulan munasabah bahawa dengan percubaan melarikan diri, seseorang itu boleh dikatakan mungkin mempunyai minda bersalah atau pengetahuan tentang sesuatu yang salah yang dimilikinya (lihat perenggan 21).

(4) Tiada keterangan sama sekali bahawa tertuduh kedua, dalam apa jua cara, mempunyai kaitan dengan beg hitam Quiksilver dan dadah dalam bungkusan Alicafe atau pengetahuan mengenainya selain daripada sekadar fakta bahawa dia merupakan pemandu Proton Iswara hijau tersebut. Berdasarkan keseluruhan keterangan dan dapatan fakta, pihak pendakwaan gagal membuktikan kes prima facie terhadap tertuduh kedua mengenai jagaan atau kawalan dadah-dadah tersebut untuk membangkitkan anggapan di bawah s 37(d) terhadap tertuduh kedua (lihat perenggan 25–26).

(5) Selain daripada fakta bahawa kedua-dua tertuduh dilihat menaiki kereta yang sama ke tempat kejadian dan sekadar dakwaan oleh PW2 dan PW5 bahawa setiap tertuduh cuba untuk melarikan diri tanpa apa-apa keterangan untuk menyokong satu sama lain mengenai sama ada terdapat pergelutan dalam menangkap mereka kerana mereka cuba melarikan diri atau bahawa terdapat kejar-mengejar sebelum mana-mana tertuduh boleh ditahan atau apa-apa tindakan atau perlakuan oleh tertuduh untuk menunjukkan bahawa sememangnya terdapat percubaan sedemikian, fakta sekadar cakap mulut bahawa tertuduh cuba melarikan diri tanpa lebih, adalah amat tidak mencukupi untuk membuktikan fakta yang didakwa. Tiada keterangan untuk membuktikan atau membolehkan mahkamah membuat kesimpulan munasabah bahawa terdapatnya rancangan yang diatur terlebih dahulu untuk membuktikan niat bersama di bawah s 34 Kanun Keseksaan terhadap kedua-dua tertuduh (lihat perenggan 36).]

Notes

For cases on accused persons jointly charged, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1167–1170.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301, CA (refd)
Jamaluddin Saad & Anor v PP [2013] 1 LNS 481, CA (distd)
Jonaidi bin Mansor v PP [2002] 2 MLJ 111; [2002] 1 CLJ 730, CA (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65, CA (refd)
Mahbub Shah v Emperor MR [1945] PC 118, PC (refd)
Mohamad Yazri bin Minhat v PP [2003] 2 MLJ 241 ; [2003] 2 CLJ 65, CA (consd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273 ; [1998] 2 CLJ 170, FC (refd)
Ong Ah Chuan v PP Koh Chai Cheng v PP [1981] 1 MLJ 64 ; [1980] 1 LNS 181, PC (refd)

PP lwn Abdul Halim Ishak & Satu Lagi [2013] 9 CLJ 599, CA (refd)
PP v Eswaran a/l Susop (unreported) (refd)
PP v Jaswant Singh a/l Singh (unreported) (refd)
PP v Lai Ching Chong [1996] MLJU 190 ; [1996] 1 LNS 445, HC (refd)
PP v Mohd Bandar Shah bin Nordin & Anor [2008] 4 MLJ 556 ; [2008] 4 CLJ 859, CA (refd)
Sitaram v State [1958] Cr LJ 1380 (refd)
Tai Chai Keh v PP [1948-1949] Supp MLJ 105b, CA (refd)
Wan Yurillhami bin Wan Yaacob & Anor v PP [2010] 1 MLJ 749, FC (refd)

Legislation referred to

Criminal Procedure Code s 180(1), (4)
Dangerous Drugs Act 1952 ss 2, 12(2), (3), 37(d), 37(da), 37(da)(xvi), 39A(2), 39A(2)(r), 39B, 39B(1), 39B(1)(a), First Schedule
Penal Code s 34

Hamdan Hamzah (Senior Federal Counsel, Attorney General's Chambers) for the prosecution.
Ram Singh (YS Lo with him) (Ram Singh & Co) for the first accussed.
Chau Chin Tang (Chau & Thien) for the second accused.

Chew Soo Ho J:

INTRODUCTION

[1] Both the accused are charged with the following charges:

(a) against first and second accused vide charge A:

> Bahawa kamu, pada 4hb Februari 2013 lebih kurang jam 6.40 pagi bertempat di tebing Sungai Pasir Putih, Tanjung Batu, Logpond, di dalam Daerah Tawau, di dalam Negeri Sabah, dalam melaksanakan niat bersama, telah mengedar dadah berbahaya iaitu methamphetamine seberat 1155.96 gram dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di seksyen 39B(2) Akta yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan.

(b) against the first accused alone vide charge B:

> Bahawa kamu, pada 4hb Februari 2013 lebih kurang jam 6.40 pagi bertempat di tebing Sungai Pasir Putih, Tanjung Batu, Logpond, di dalam Daerah Tawau, di dalam Negeri Sabah, memiliki dadah berbahaya iaitu methamphetamine dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya 1952 dan boleh dihukum di seksyen 12(3) Akta yang sama.

[2] Both of them claimed trial to charge A while the first accused also claimed trial to charge B. The trial was proceeded and at the end of the prosecution's case, this court has adjourned the case for both the prosecution ('PP') and the respective counsel for the accused persons to tender their respective written submissions as requested and it was scheduled for decision of this court on 23 January 2014 which was duly delivered. I append below my grounds of decision at the end of the PP's case where I reduced the charge A and called upon the first accused to enter his defence while acquitting and discharging the second accused. For charge B, the first accused was also ordered to enter his defence.

[3] On 13 February 2014 when this case was called-up against the first accused for his defence under the reduced charge A which is under s 12(2) and punishable under s 39A(2) of the Dangerous Drugs Act 1952 ('the DDA 1952') and the charge B, first accused who claimed trial initially to the reduced charge A and charge B on 23 January 2014, changed his pleas to one of guilt to both the charges and he was accordingly found guilty, convicted and sentenced by this court based on the evidence adduced by the PP. The decision of this court therefore also contains sentences imposed on the first accused and the grounds thereof.

[4] The public prosecutor has also on 13 February 2014 made an oral application for a stay of the proceeding pending appeal against the ruling of this court at the end of the PP's case. In the light of the first accused having pleaded guilty to both the reduced charge A and charge B, I find that the stay application has been rendered redundant being overtaken by the event and the PP can now appeal against the whole decision of this court if so wishes. I therefore dismiss the aforesaid oral application for stay pending appeal.

BRIEF FACTS OF THE CASE

[5] On 4 February 2013 at about 12.20am, the complainant Cpl Justin bin Lakai ('PW2') of the Marine Police at Tawau received information from the public of an alleged drug trafficking of methamphetamine ('syabu') at the river bank of Sungai Pasir Putih, Tawau. This information was received while he was on duty at the Unit Risikan, Polis Marin, Tawau. Thereafter, PW2 conveyed this information to his acting commanding officer and was instructed to verify the said information and to make the raid with other police personnel.

[6] At about 2am, PW2 together with Cpl Isaac Amirul bin Abdullah ('PW5') and Const Alexise proceeded to the river bank at Sungai Pasir Putih Logpond, Tawau ('Logpond') in a private car. On arrival at Logpond, they took their respective hiding positions in the event a raid was to be effected. At about 6.40am, a green Proton Iswara No SS7921F entered the ambush position and

parked by the side of the car which PW2, PW5 and Const Alexise came in. Two male persons were seen in this Proton Iswara and they were identified as the first accused who was seated at the front passenger seat while the second accused was the driver being seated at the driver seat. The second accused alighted from the car and went towards the river bank where he was arrested by PW5 while PW2 arrested the first accused after identifying himself to the first accused who was about to alight from the front passenger seat and who was allegedly attempting to flee.

[7] Cpl Justin (PW2) then conducted a search of the said Proton Iswara and found a black bag of Quiksilver brand on the floor at the front passenger seat. Upon further examination of this bag, it was found to contain two plastic packets of Ali Cafe Power Root 5 in 1 ('Ali Cafe'). In the first Ali Cafe plastic packet, PW2 found 11 translucent plastic packets containing crystalline substance suspected to be methamphetamine. In the second plastic packet of Ali Cafe, PW2 found inside it two silver plastic packets also containing crystalline substance suspected to be methamphetamine. These packets were heat-sealed and PW2 had to tear off part of the packets in order to examine the contents within them. Other than the two plastic packets of Ali Cafe and their contents, the black bag was found to contain clothings which were later found to body fit the first accused.

[8] PW2 subsequently conducted body search on the first accused and found two small translucent plastic packets containing crystalline substance suspected to be methamphetamine in the right front pocket of the jeans worn by the first accused. These two packets were also heat-sealed. From the search on the second accused, PW2 did not recover anything incriminating.

[9] All exhibits including the Proton Iswara were seized and together with both accused, were taken back to the Tawau Marine Police Base where PW2 marked all the exhibits seized, lodged a police report, issued search lists which were duly served on the accused; he also requested for dusting for fingerprints, taking of photographs of the exhibits, inter alia, which were carried out. PW2 also weighed the suspected drugs together with the translucent plastic packets and the silver plastic packets which contained them and found the weight to be about 1,572.73g.

[10] On 4 February 2013 at about 12.30pm, all the exhibits seized were handed to the investigating officer (IO), Insp Nalini who marked the exhibits again with her own markings in addition to PW2's markings. All exhibits were kept by the IO and/or in the exhibits store at IPD Tawau.

[11] On 6 February 2013 at about 2.52pm, the suspected drugs were handed by the IO to the chemist at the Chemistry Department Sabah at Kota

Kinabalu. After analysis, the chemist concluded that the suspected drugs in the 11 translucent plastic packets (in the first Ali Cafe packet) are methamphetamine weighing 419.26g and in the two silver plastic packets (in the second Ali Cafe packet), they contain methamphetamine weighing 736.70g in the total of 1155.96g. As to the two small translucent plastic packets found in the pocket of the jeans worn by the first accused, the chemist found the gross weight of the crystalline substance to be 0.96g and after qualitative analysis, he found the 0.96g crystalline substance to contain methamphetamine. However, in compliance with the Prosecution Circular No 4 of 2004 dated 10 June 2004 issued by the Attorney General's Chambers, no quantitative test was carried out to determine the nett weight of the methamphetamine as it was not required when the gross weight of drugs does not exceed 2g methamphetamine is listed as dangerous drugs in the Dangerous Drugs Act 1952 ('the DDA 1952').

EVALUATIONS AND FINDINGS

[12] It is trite that at the end of the case for the prosecution (PP), the role of the trial court is to consider whether the PP has made out a prima facie case against the accused: s 180(1) of the Criminal Procedure Code ('the CPC'). It is equally trite that by prima facie, the court will have to undertake a maximum evaluation of the PP's case to the extent that if the defence of the accused is called and should the accused elect to remain silent, the court must be prepared to find the accused guilty and convict him forthwith (see *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 (FC); *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65 (CA)). What constitute the basic requirement of proof by the PP of a prima facie case can be garnered from s 180(4) of the CPC which provides that *'a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offences which is unrebutted or unexplained would warrant a conviction'*. In short, it is fundamental for the PP to prove each and every ingredient of the offence that the accused is charged with with credible evidence; without the ingredients of the offence or charge being proved, a prima facie case cannot be said to have been made out.

[13] For the first charge of trafficking of 1,155.96g of methamphetamine, a dangerous drug listed under the First Schedule of the DDA 1952 against both the accused in furtherance of a common intention of both accused, the PP can prove by credible evidence showing the direct trafficking as provided under s 2 of the DDA 1952 or by proving possession as required in criminal law by both accused of the said quantity of drugs and then invoke the presumption under s 37(da)(xvi) of the DDA 1952 to presume, until the contrary is proved, that the accused were trafficking in the said drugs besides proving the drugs to be dangerous drugs as defined and listed under the DDA 1952. In addition, PP is also required to prove the ingredient of common intention under s 34 of the

Penal Code for the first charge. However, in order to invoke the mandatory presumption under s 37(da)(xvi) of the DDA 1952, it is incumbent upon the PP to prove with direct evidence of possession of the dangerous drugs on the accused without the aid of the presumption under s 37(d) of the DDA 1952 which provides that:

> 37 In all proceedings under this Act or any regulation made thereunder—
>
> ...
>
> (d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;
>
> (da) any person who is found in possession of—
>
> (xvi) 50 grammes or more in weight of methamphetamine;
>
> otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug;
>
> ...

[14] If PP is able to prove with direct evidence of possession coupled with the mandatory presumption under s 37(da)(xvi) of the DDA 1952, the ingredient of trafficking shall then be deemed or construed as prima facie proved. Needless to say if there is direct evidence of trafficking as defined under s 2 of the DDA 1952 having been proved at the end of the PP's case, the weight of the drug will be immaterial or irrelevant so long that the drug is proved to be dangerous drug as listed in the First Schedule of the DDA 1952.

[15] Double presumptions under s 37(d) and 37(da) of the DDA 1952 to prove trafficking under s 39B of the DDA 1952 is now seen as trite law to be inapplicable and non-permissible since the case of *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 ; [1998] 2 CLJ 170 (FC) which held, inter alia, that:

> [8] On the wording of s 37 (da) as it stands, to read the presumption of possession (ie possession as understood in criminal law, with knowledge) provided in s 37 (d) into s 37 (da), so as to involve against an accused a *further presumption* of trafficking (ie *presumption upon presumption*), would not only ascribe to the phrase 'found in possession' in s 37 (da) a meaning wider that it ordinarily bears but would also be against the established principles of construction of penal statutes and unduly harsh and oppressive against the accused. (Emphasis is added.)

This court must therefore refrain from doing so.

TRAFFICKING BY 'TRANSPORTING'

[16] In the instant case, learned DPP has submitted that there was direct trafficking by 'transporting' of the drugs citing the case of *Mohamad Yazri bin Minhat v Public Prosecutor* [2003] 2 MLJ 241 ; [2003] 2 CLJ 65 (CA) which had referred to the Privy Council's case of *Ong Ah Chuan v Public Prosecutor Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64 ; [1980] 1 LNS 181 which held that:

> Transporting drugs for mere personal purposes or use, as distinct from transporting for other purposes, does not of itself afford sufficient evidence of the offence of trafficking.
>
> Transporting in the definition of 'traffic' in s 2(i) of the Narcotic Control Act Can 1961? 61 Ch 35 is not meant in the sense of mere conveying or carrying or moving from one place to another, but in the sense of doing so to promote the distribution of the narcotic to another.

[17] On the Canadian approach in this definition of 'transporting', I have stated in my judgment at the end of the PP's case dated 17 July 2013 in Criminal Trial No BKI-45D-6&7/5 of 2012, *Public Prosecutor v Eswaran a/l Susop* and *Public Prosecutor v Jaswant Singh a/l Singh* and wish to reiterate as follows:

> I find that there is no such provision in our DDA 1952 to accede to the Canadian definition. Section 2 of our DDA 1952 does not provide or require such further element as in the Canadian case. Nevertheless, I do agree that to constitute the meaning or definition of 'to traffic' or 'trafficking' under s 2 of the DDA 1952, it must necessary involve the transfer of possession and must mean moving the drugs from one place to another; it may mean moving them also to another person but it need not to do so (per Lord Diplock in *Ong Ah Chuan* as to the meaning of 'transport' in the definition of trafficking under s 2 of the Singapore Misuse of Drugs Act 1973 where this definition is similarly contained in our section 2 DDA 1952.

[18] As held by His Lordship Gopal Sri Ram JCA (as he then was) in *Mohamad Yazri bin Minhat v Public Prosecutor* summarising the law as enunciated by Lord Diplock in *Ong Ah Chuan*, quote:

> To summarise, the fact that the accused is transporting a quantity of drugs from one point to another does not make him a trafficker. Whether he is a trafficker in those circumstances depend on the facts and circumstances of the given case, including the quantity of the drugs and any transaction the accused proposed to enter into.

[19] From the evidence adduced in the instant case, there is no evidence from where the accused persons were alleged to have transported the said drugs

to the scene at Logpond. Evidence only shows that the second accused was driving the said green Proton Iswara (P11) with the first accused seated at the front passenger seat arriving at Logpond. Although there is evidence from the owner of the said car that the second accused who is his wife's brother in law, had come to his house with another person to take the said car as there was someone who was interested to buy the said car and wanted to see it but the other person who came along with the second accused was not identified whether he was the first accused or some other person by the owner of the car. There was also no evidence that the second accused and/or the other companion was/were seen to have placed the black bag containing the drugs inside the car particularly at the floor of the front passenger seat after the second accused was handed the ignition key of the car. Hence, there is absolutely no valid reason to draw any inference that the drugs were 'transported' from the house of the car owner to Logpond. This basic element of transporting from one point to another is clearly not proved at the end of the PP's case. In addition, there is not an iota of evidence to show 'any transaction that the accused proposed to enter into' as stated in *Mohamad Yazri bin Minhat*'s case. To echo the words of His Lordship Gopal Sri Ram as cited above 'the fact that the accused is transporting a quantity of drugs from one point to another does not make him a trafficker'. The same position should apply in the instant case.

[20] Upon a finding of facts, I find that the PP has failed to prove direct trafficking by 'transporting' under s 2 of the DDA 1952 to constitute the offence of trafficking under s 39B(1)(a) of the DDA 1952.

POSSESSION OF THE TOTAL OF 1155,96G OF METHAMPHETAMINE

[21] Evidence of PW2 (Cpl Justin) stated that the first accused whom he arrested was seated at the front passenger seat and the Quiksilver black bag which contained the drugs was found on the floor of the said front passenger seat. This fact was not challenged. Although PW2 said that the first accused attempted to flee, I do not find sufficient evidence to prove this fact as alleged apart from PW2's mere assertion which was unsubstantiated. I find as a fact that the first accused was arrested when he was about to alight from the car as testified by PW2 himself; there is nevertheless no evidence from PW2 as to how the first accused was said to attempt to escape; there was no evidence showing first accused had tried to push away PW2 or to struggle with PW2 in order to break loose to escape or any other conducts to show such allegation of an attempt to flee. In the cited case of *Public Prosecutor v Lai Ching Chong* [1996] MLJU 190 ; [1996] 1 LNS 445, KC Vokrah J (as His Lordship then was) held the view that even if there was a slight struggle when the accused was being arrested or that he tried to run away, these actions could be actions of an innocent reacting to an unexpected and sudden confrontation. In the instant case, if the first accused was about to alight meaning he might not even have

stepped his foot out of the car and was apprehended there and then, I cannot perceive how he could attempt to escape when PW2 had closed in from the left front door of the car where the first accused was about to alight and arrested him in that position. I find doubt in the evidence of PW2 which is unsubstantiated that the first accused had attempted to escape particularly so when there was no evidence of any such conduct to attempt to flee. No reasonable inference can therefore be drawn from any conduct of the first accused that he had knowledge of the incriminating exhibits that was found in the black bag inside the said car on this bare allegation by PW2. Upon a finding of fact, I am not satisfied that such alleged conduct of an attempt to flee is proved by the PP to enable this court to draw a reasonable inference that with an attempt to flee, one can be said to perhaps have a guilty mind or knowledge of something incriminating that he was in possession of.

[22] After the arrest of the first accused, PW2 conducted a search on the Quiksilver black bag which was closed (zipped) but without any lock. Inside the bag, PW2 found two plastic packets of Ali Cafe; the first Ali Cafe packet, upon examination by PW2, was found to contain 11 translucent small plastic packets containing crystalline substance suspected to be 'syabu' (methamphetamine); second Ali Cafe packet was found to contain two silver packets which were found to contain crystalline substance also suspected to be 'syabu'. These two packets of Ali Cafe were sealed and PW2 had to tear open part of them to examine the respective contents within the respective packet.

[23] All the suspected drugs were ultimately analysed by the chemist (PW1) who confirmed that all the crystalline substances were methamphetamine, a dangerous drug listed, in Schedule 1 of the DDA 1952 to be in the total weight of 1155.96g. I do not find any break in the chain of evidence of the exhibits in the possession of PW1 from the time he received them till he completed the analysis and returned to the police after having packed, labelled and sealed the exhibits. I am also satisfied that PW1 had carried out all the qualitative and quantitative tests in accordance with the accepted or required procedure laid down by the United Nations. It is thus proved that the Quiksilver black bag contained dangerous drug of methamphetamine in the total quantity of 1155.96g. The question is: were the two accused in possession of them pursuant to a common intention? This bag was found on the floor of the front passenger seat where the first accused was seated. Although it was closed, it was unlocked and could therefore be easily unzipped by the first accused to notice the content in the said bag. This bag also contained, in addition to the two packets of Ali Cafe, some clothings. Body fit of these clothings were carried out on both the accused and it was found that the clothings seemed to fit the first accused well but not the second accused. The photographs clearly show that. Further evidence from PW2 showed that he conducted body search on the accused and found two small packets containing crystalline substance in the

front pocket of the jeans worn by the first accused. This crystalline substance contained in these two packets was also analysed by the chemist (PW1) who found them to be also methamphetamine but since the weight of the crystalline substance was less than two grammes, no quantitative test was carried out in line with the Prosecution Circular No 4 of 2004 to determine its nett weight. With these evidence at hand, I am of the view that there is sufficient evidence to reasonably infer and hold that the first accused was having custody or control of the Quiksilver black bag which was just at his feet as he could easily deal with at any time.

[24] It is a fact that the two Ali Cafe packets were sealed and their contents were only visible and known after they were respectively torn opened partly. In other words, the said drugs were contained in a concealed manner which could not be seen and known unless torn opened. Although the first accused was found to possess two small plastic packets of methamphetamine in his jeans pocket, there is no evidence particularly from the chemist (PW1) whether the nature of the methamphetamine in these two small plastic packets is the same or similar with the nature of methamphetamine found in the two Ali Cafe packets and whether the two small plastic packets are the same or similar in size and material with the 11 plastic packets as found in the first Ali Cafe packet by PW2. There is also no evidence to link the two small plastic packets with the 11 plastic packets in the first Ali Cafe packet. In the circumstances, I find it unreasonable to infer that by the mere possession of the two small plastic packets of methamphetamine, the first accused had had knowledge of the drugs contained in the two Ali Cafe packets in the black Quiksilver bag. Nevertheless, having found the first accused to be in custody or under his control the said black bag containing the drugs, I find it reasonable and appropriate to invoke the presumption under s 37(d) of the DDA 1952 that the first accused, in the circumstances of this case, shall be deemed to have been in possession of the said drugs in the Ali Cafe packets in the black Quiksilver bag and shall be deemed to have known the nature of such drugs as contained in the two Ali Cafe packets; see *Jonaidi bin Mansor v Public Prosecutor* [2002] 2 MLJ 111 at p 114; [2002] 1 CLJ 730 at p 733 (CA). Having invoked the statutory presumption under s 37(a) of the DDA 1952, I hold consequently that the PP has proved a prima facie case of possession of the total of 1155.96g of methamphetamine on the first accused. Although the total quantity of methamphetamine exceeds 50g, the presumption under s 37(da) of the DDA 1952 cannot be invoked to prove the charge of trafficking as double presumption is not permissible in law to assist the PP in proving trafficking of dangerous drugs; *Muhammed Hassan v Public Prosecutor* is relevant. For the above reasons, I reduce the charge against the first accused to one of possession of 1155.96g of methamphetamine and amend the charge to read as follows:

> Bahawa kamu, pada 4hb Februari 2013 lebih kurang jam 6.40 pagi, bertempat di tebing Sungai Pasir Putih, Tanjong Batu, Logpond, di dalam Daerah Tawau, di

dalam Negeri Sabah, telah didapati memiliki dadah berbahaya iaitu methamphetamine seberat 1155.96 grammes dan oleh yang demikian, kamu telah melakukan suatu kesalahan dibawah seksyen 12(2) Akta Dadah Berbahaya 1952 dan boleh dihukum dibawah seksyen 39A(2)(r) Akta yang sama.

[25] As against the second accused, apart from the PP's contention of common intention (infra) and the fact that he was driving the car (P11), I find absolutely no evidence being adduced by the PP to prove that the second accused had custody or control of the drugs in the black Quiksilver bag. Evidence only shows that he had taken the said Proton Iswara car from the brother in law of his wife who intended to sell the car and he had driven the said car to the scene at Logpond. At the scene, he was allegedly seen to have alighted from the car and walked towards the river bank. Although PW5 said in evidence that the second accused attempted to run away when confronted by PW5, I do not find that even accepting PW5's evidence that itself is sufficient to constitute an overt act to allow this court to infer or imply custody or control or knowledge of the existence of drug in the black Quiksilver bag. Moreover, this evidence of PW5 seems to be contradicted by the evidence of PW2 who said that the second accused was arrested outside the car but without any evidence to explain as to where the second accused was actually arrested. Was second accused arrested just outside the car or was he arrested near the stall structure towards the jetty or the river bank and whether the second accused had tried to run away when he was arrested by PW5? This doubt which was not erased by the PP must be resolved in favour of the second accused; see the cited case of *Tai Chai Keh v Public Prosecutor* [1948-1949] Supp MLJ 105b , at p 108 where Laville J held that where there is more than one inference, the inference most favourable to the accused should be adopted. To reiterate, there is also absolutely no evidence that the second accused was in whatever way to the black Quiksilver bag and the drugs in the Ali Cafe packets therein or any knowledge thereof apart from the mere fact that he was the driver of the green Proton Iswara.

[26] On the totality of evidence and upon a finding of fact, I find that PP has failed to prove a prima facie case against the second accused of custody or control of the said drugs for the presumption under s 37(d) of the DDA 1952 to be invoked against the second accused.

POSSESSION OF METHAMPHETAMINE: CHARGE 'B'

[27] Evidence of PP shows unequivocally that the two plastic packets containing suspected 'syabu' were recovered by PW2 from the front pocket of the jeans worn by the first accused. This uncontradicted evidence proved prima facie that the first accused was having physical possession of the two packets of crystalline substance which was ultimately analysed and confirmed by the chemist (PW1) to be methamphetamine. Although the weight of

methamphetamine was not determined, the confirmation of the crystalline substance to be methamphetamine, a dangerous drug under the First Schedule of the DDA 1952 suffices to constitute the charge under s 12(2) punishable under s 12(3) of the DDA 1952. Therefore, I find that the PP has proved a prima facie case against the first accused on charge B.

BREAK IN THE CHAIN OF EVIDENCE

[28] Evidence of PW2, Cpl Justin who headed the three men team in the arrest of both the accused and evidence of PW5, Cpl Isaac who was with PW2 throughout the raid until they, returned to the Marine Base, after the drugs and all other exhibits were seized at the scene by PW2, they were handed over to PW5 who bought them back to Tawau Marine Base in the same car they came in while PW2 travelled in the green Proton Iswara with the accused but both cars proceeded in a single file with one following the other back to the Tawau Marine Base. At the operation room at the Marine Base, all the exhibits seized were handed back to PW2 by PW5 who was nevertheless still assisting PW2 in guarding the exhibits when PW2 was doing all the process of lodging police report, marking exhibits, weighing the drugs, issuing search lists, dusting for fingerprints by other police personnel, inter alia. PW2 was at all time in possession of the exhibits in the operation room at Marine Base. Although there might be some police personnel coming into and leaving the said operation room, I do not find any evidence that anyone else had access to the exhibits which apart from PW2, were also guarded by PW5. PW2 had not given his consent or permission to anyone to access the exhibits. Handing over of all the exhibits to the IO Insp Nalini were also conducted in the same operation room.

[29] Defence had submitted that the IO had sent the exhibits to the exhibits store late and after re-collecting the exhibits (the drugs) from the exhibits store, had failed to deliver them to the chemist but on a later date. I find from the evidence of the IO and all the markings, signatures and the police seals on the exhibits made either by PW2 or the IO respectively which are respectively identified to be still on these exhibits, coupled with the evidence of the IO that before the exhibits were sent to the exhibits store and the chemistry Department respectively, the IO had kept them in her cabinet under lock and key ie under her full custody and control, there is no break in the chain of evidence relating to the exhibits in this case. I am equally satisfied that the IO retained the custody and control of the drug exhibits when a press conference was held at Kota Kinabalu by the Chief Police Officer of Sabah where the IO was in attendance throughout.

[30] From the evidence as a whole, I do not find any break in the chain of evidence relating to the exhibits from the hands of PW2 to the IO and from the

IO to the storekeeper and to the chemist. All exhibits were identified in court by PW2 and the IO through their respective markings and signatures. When the drug exhibits were in the hands of the chemist (PW1), his evidence shows that he had kept the exhibits under lock and key in his cabinet in the strong room of the Chemistry Department Sabah until he had completed analysis when he packed them accordingly with the remaining of the drugs after analysis in the plastic packets supplied by the Chemistry Department while all the original plastic packets were also duly kept before packing and sealing with Chemistry Department's seals/sticker seals and the laboratory number into the same box marked NA1 (P5) received by PW1 from the IO. The sealed exhibits were subsequently returned to the IO The chemist had identified all the drug exhibits analysed by him through the laboratory number, the seals and/or his signature on them.

[31] All the exhibits when tendered in court were still sealed with the respective seals intact and properly identified by the respective witnesses in court. I am satisfied from the totality of the evidence and upon a finding of facts that there was no break in the chain of evidence relating to the exhibits in the instant case.

IDENTITY OF EXHIBITS

[32] Upon the finding of the court that there was no break in the chain of evidence of the exhibits from the hands of PW2 to the IO and to the chemist and subsequently after the drugs were analysed from the chemist back to the IO and to the exhibits store, there is no doubt as to the identity of the exhibits seized till they were analysed and returned although there might occur the alleged discrepancy regarding the 'ketulan hablur jernih' and 'bahan hablur jernih' as used. I consider this to be minor discrepancy in description which is not substantially material as to construe the drugs as of different identity for reason that the drugs as shown in the photographs taken show undoubtedly that they were crystalline substance; they were not in powdery form. My knowledge of the word 'bahan' as that it is a generic term referring to 'substance' or 'material' which can include the more specific term 'ketulan' ('crystalline'). All the markings, signatures etc on the packets containing the drugs were positively identified by the respective prosecution witnesses who affixed them as well as the chemist who analysed, packed and sealed those drugs after analysis. There were also no evidence of any tampering of the exhibits. I do not think that any weight can be attached to this contention.

[33] On the first accused's contention in submission that the gross weight as obtained by the complainant, PW2 is more than the gross weight of the drugs before analysis as weighed by the chemist (PW1), it must be noted that PW2 used a weighing scale/machine which was not calibrated while PW1 weighed

those drugs with a calibrated weighing scale/machine. Secondly, PW2 weighed the drugs with all their plastic packets to determine the gross weight. In that circumstances, there is bound to have a difference in the weight derived at by PW2 and PW1 respectively. Since the disparity in weight is not unreasonably substantial as to raise a reasonable doubt, I find no valid and plausible ground to infer any fact that the disparity could be caused by a change in the identity of the exhibits. It was most probably caused by the respective weighing scale/machine and the respective manner of weighing by PW2 and PW1 respectively.

[34] From the evidence as a whole and upon a finding of fact, I do not find any change in the identity of the drugs to refute the drug as found by PW2.

COMMON INTENTION

[35] Common intention implies acting in concert, existence of a pre-arranged plan which is to be proved either from conduct or from circumstances or from any incriminating facts: *Sitaram v State* [1958] Cr LJ 1380. It is also settled law that 'a prearranged plan is not synonymous with a premeditated crime: for, a prearranged plan may be formed instantaneously' (see *Mahbub Shah v Emperor MR* [1945] PC 118 *Public Prosecutor v Mohd Bandar Shah bin Nordin & Anor* [2008] 4 MLJ 556 at p 587; [2008] 4 CLJ 859, at p 870 (CA) as cited by PP). PP has further submitted the case of *Jamaluddin Saad & Anor v Public Prosecutor* [2013] 1 LNS 481 where the fact showed that the first appellant as the driver of the car and the second appellant was seated at the front passenger seat and when the police officer introduced himself as police officer, almost immediately both the appellants tried to run away by opening their respective car door. However, the fact in our present case differs in that the second accused had alighted and was arrested outside the car as stated by PW2 while PW5 who arrested the second accused said that the second accused was arrested somewhere near the jetty which was well away from the car. The first accused was about to alight when he was arrested. As I have found above that there was doubt and insufficient proof of the alleged conduct of an attempt to flee, the fact of this instant case is distinguishable from the fact in *Jamaluddin Saad & Anor v Public Prosecutor*. In *Wan Yurillhami bin Wan Yaacob & Anor v Public Prosecutor* [2010] 1 MLJ 749 (FC) as cited in *Jamaluddin Saad & Anor v Public Prosecutor*, His Lordship Zulkifli Ahmad Makinudin FCJ (now CJM) said of the crucial test to apply in dealing with the criminal liability under s 34 of the Penal Code as follows:

> ... the crucial test is that such (pre-concert) plan must precede the act constituting the offence. The existence of common intention is a question of fact and in each case it may be proved as a matter of inference from the circumstances of the case ...

[36] In the instant case, apart from the fact that both accused were seen travelling in the same car to the scene and the mere allegation by PW2 and PW5 that the respective accused tried to flee without any evidence in support such as whether there was any struggle in arresting them as they attempted to run away or there was a chase before any of the accused could be apprehended or any act or conduct of the accused to show that there was indeed such an attempt, the mere fact of paying lips service saying that accused tried to run away without more is profoundly insufficient to constitute proof of the alleged fact. I find upon a finding of fact that there was no evidence to prove or to enable this court to draw a reasonable inference that there existed any pre-arranged or pre-concerted plan to prove common intention under s 34 of the Penal Code against both the accused. I also do not find any common intention to have arisen instantaneously on the facts of this instant case.

CONCLUSION AT THE END OF PUBLIC PROSECUTOR'S CASE

[37] Upon a maximum evaluation of the evidence adduced at the end of the PP's case and for the foregoing reasons, I hold that the PP has failed to prove a prima facie case against both accused on charge A under s 39B(1) of the DDA 1952 but that the PP has proved a prima facie case of possession under s 12(2) punishable under s 39A(2)(r) of the DDA 1952 against the first accused but not against the second accused. The charge A against the first accused is accordingly amended as above stated. I further hold that PP has also proved a prima facie case against the first accused in respect of charge 'B'. first accused claimed trial to both the amended charge A and charge B. I then call upon the first accused to enter his defence on both the reduced charge A as amended above and the charge B.

[38] In respect of the second accused, upon the finding of this court as above that the PP has failed to prove a prima facie case against him in respect of charge A, I therefore acquit and discharge the second accused without calling him to enter his defence.

ON 13 FEBRUARY 2014, THE SCHEDULED DATE FOR FIRST ACCUSED'S DEFENCE

[39] The date for the defence of the first accused is scheduled to be heard on 13 February 2014. To reiterate, the first accused after the reduced charge A and charge B have been respectively read, explained to and understood by him, he changes his plea to the respective charges to one of guilty and he also understands the nature and consequences of his respective pleas. This court having at the end of the PP's case found possession to have been proved against the first accused and without the first accused adducing any evidence in

A rebutting, holds that the PP has proved the amended charge A and charge B beyond reasonable doubt and the first accused is thus found guilty of both charges and is accordingly convicted.

B **[40]** In mitigation, learned counsel for the first accused on this date 13 February 2014, Mr YS Loh standing in for Mr Ram Singh, tendered the written submission on mitigation for the first accused pleading for a lenient sentence on grounds, inter alia, that first accused is a first offender; he has pleaded guilty at the first opportunity; he was young of 23 years of age, remorseful and is resolute to reform; he had cooperated with the police throughout the investigation. On the trend of sentencing, it was cited in support *Public Prosecutor lwn Abdul Halim Ishak & Satu Lagi* [2013] 9 CLJ 599 (CA) which however relates to sentencing of cases involving cannabis. Cannabis is construed as a 'soft drug' for which the trend of sentencing differs from drug such as heroin, morphine, methamphetamine etc which are considered as 'hard drugs'. I do not find this authority to be appropriate to reflect the sentencing trend on methamphetamine.

[41] The public prosecutor submitted, inter alia, that dangerous drugs are menace to society and the court should take into account public interest in imposing a deterrent sentence.

[42] Having considered the mitigating factors and balancing them with public interest, I find that the public interest would outweigh the personal interest of an individual in cases of this nature. Drug cases have been rampant for which the court cannot ignore. Court must reflect the abhorrence and the seriousness of the offence by imposing an appropriate sentence so as to serve as a deterrence not only to the first accused but also to deter others from resorting to similar crime.

[43] I therefore sentence the first accused to charge A as amended and reduced, to 17 years imprisonment and ten strokes of whipping. Sentence of imprisonment is to run from date of arrest.

[44] For charge B, accused is sentenced to six months imprisonment from date of arrest.

[45] All exhibits except documentary are to be returned to the PP.

Order accordingly.

Reported by Afiq Mohamad Noor